Supreme Court, U.S.
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No. 92-1556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; KEITH WILLIAM KERR, as representative of Certain Underwriters, YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), INSURANCE CORPORATION OF IRELAND, P.L.C., ANCON INSURANCE COMPANY (U.K.), LTD., SCAN RE INSURANCE,

Petitioners,

v.

INTERNATIONAL INSURANCE COMPANY, CLARKSON PUCKLE GROUP, LTD., ERAS (INT'L), LTD., CLARKSON PUCKLE INT'L REINSURANCES, LTD., BAIN CLARKSON, LTD. and SOCIETE COMMERCIALE DE REASSURANCE, S.A.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit was correct in denying a petition for writ of mandamus which sought protection from a district court order preventing Petitioners from redesignating a claim of privilege on certain documents and instead forcing Petitioners to disclose privileged attorney-client communications as a sanction for not initially identifying the "correct" privilege where the documents: (1) had always been identified as protected communications; (2) had not been produced; and (3) has not been tested as to any claim of privilege.

RULE 29.1

LIST OF ALL PARTIES

A list of all of the parties is set out in full in the caption.

A list of the parents and non wholly-owned subsidiaries of the Petitioners is as follows:

Yasuda Fire and Marine Insurance Company (U.K.): Parent - Yasuda Fire & Marine Insurance Co. Japan; Non wholly-owned Subsidiary - None

Insurance Corporation of Ireland, P.L.C.: Parent - Irish government Ireland, P.L.C.; Non wholly-owned Subsidiary - None

Ancon Insurance Company (U.K.), Ltd.: Parent - English and American; Non wholly-owned Subsidiary - None

Scan Re Insurance: Parent - Lansforsakringsholagens AB/ Gjensidige Norsk Skadeforsikring; Non wholly-owned Subsidiary - None

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON; KEITH WILLIAM KERR, as representative of Certain Underwriters, YASUDA FIRE AND MARINE INSURANCE COMPANY (U.K.), INSURANCE CORPORATION OF IRELAND, P.L.C., ANCON INSURANCE COMPANY (U.K.), LTD., SCAN RE INSURANCE,

Petitioners,

v.

INTERNATIONAL INSURANCE COMPANY, CLARKSON PUCKLE GROUP, LTD., ERAS (INT'L), LTD., CLARKSON PUCKLE INT'L REINSURANCES, LTD., BAIN CLARKSON, LTD. and SOCIETE COMMERCIALE DE REASSURANCE, S.A.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The December 22, 1992 decision of the United States Court of Appeals for the Seventh Circuit denying the petition for writ of mandamus is unreported and includes no written opinion. The October 20, 1992 decision of the United States District Court for the Northern District of Illinois overruling Petitioners' objections to the February 14, 1991 and December 27, 1991 rulings of the Magistrate Judge is not reported officially, but is unofficially reported at 1992 U.S. Dist. Lexis 16311. The decisions of the Magistrate Judge issued on February 14, 1991 and December 27, 1991 have not been officially or unofficially reported.

JURISDICTION

This Court has jurisdiction to review the order of the United States Court of Appeals for the Seventh Circuit, which was entered on December 22, 1992, pursuant to 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

A. Procedural Background

Plaintiff International Insurance Company ("IIC") brought an action against defendants/petitioners Certain Underwriters at Lloyd's, et al. ("Reinsurers") in the District Court for the Northern District of Illinois. The complaint based jurisdiction on diversity of citizenship under 28 U.S.C. §1332. The Magistrate Judge raised sua sponte the issue of whether or not the parties were actually diverse. The Magistrate Judge ultimately concluded that there was insufficient diversity but concluded that the district court has jurisdiction over the action under 12 U.S.C. §1331 due to a claim under the Racketeering Influence and Corrupt Organization Act. 18 U.S.C. §1961 ("RICO") et seq. contained in a

compulsory counterclaim filed by Reinsurers and based on the doctrine of ancillary jurisdiction.

IIC and Reinsurers participated in a program of environmental impairment liability insurance ("ERAS/EIL Program"). Under the ERAS/EIL Program, IIC issued EIL policies to various insureds. Reinsurers and IIC had reinsurance agreements between them concerning those policies.

On November 18, 1988, IIC filed a complaint against Reinsurers seeking recovery of sums that IIC had paid to SmithKline Beckman Corporation ("SKB") one of the EIL insureds. Reinsurers defended on the grounds that IIC's payment to SKB was not covered under the relevant reinsurance agreements.

The parties began producing documents to each other in late 1989. By February

1990, Reinsurers had produced more than 60,000 documents from 12 different companies and 31 different Lloyd's syndicates. In February 1990, Reinsurers also provided their initial privilege log to IIC. The privilege log contained 1,635 entries reflecting the breadth of the requests which IIC had directed to Reinsurers.

In February 1990, IIC produced approximately 20,000 documents. IIC also provided its privilege log claiming privilege for 354 documents. IIC supplemented its privilege log five times over the next 17 months asserting new privilege claims with respect to certain of the 354 documents listed on the original log.

Earlier in the case IIC also subpoenaed records from the law firm of Lord, Bissell & Brook ("LB&B"), which represented some of the Reinsurers prior to

this litigation. LB&B produced certain documents and withheld others on the grounds of attorney-client privilege and work product production. IIC moved to compel production of the documents LB&B withheld. On August 29, 1989, Magistrate Judge Weisberg delineated the functional boundaries of the attorney-client privilege and also held that May 5, 1988 was the first date on which this litigation was anticipated. In a memorandum of opinion issued on November 1, 1990, Judge Lindberg affirmed the Magistrate Judge's ruling on the work product date designation.[1]

By the time the district court issued this opinion, the scope of the lawsuit

[1]Although not germane here, the district court reversed the Magistrate Judge on certain aspects of the attorney-client privilege ruling.

had been expanded by an amended counterclaim pleading RICO and common law fraud, among other claims. In the fall of 1990, IIC and Reinsurers exchanged supplemental document requests that reflected the expanded scope of the claims. To this day, IIC has not challenged any of the privilege designations on the logs.

In the course of reviewing the logs in light of the November 1, 1990 order, Reinsurers found that a small number of documents listed on their log, which were created before the recently established May 5, 1988 work product date, had been classified "work product", but were also privileged attorney-client communications.[2] Reinsurers promptly advised IIC

[2]These documents are generally either letters between the Reinsurers and their counsel or notes of conversations between Reinsurers and their counsel.

(continued...)

on January 2, 1991 that they would not produce these documents because they were privileged attorney-client communications. At the same time, they produced forty-nine other pre-May 5, 1988 documents which had been listed on the privilege log with a work-product designation. On January 8, 1991, IIC filed a motion to compel Reinsurers to produce all of the documents listed as work product on the original privilege log which were created before May 5, 1988, for which no date was listed.[3]

[2](...continued)
Three of the documents are research memoranda.

[3]IIC claimed that Reinsurers had withheld 450 documents from production. IIC arrived at this figure by aggregating the 96 pre-May 5 documents with 179 redacted documents and 170 undated documents. This was an incorrect calculation by IIC because Reinsurers had already produced 49 of the 96 pre-May 5
(continued...)

B. The Magistrate Judge's Rulings

On February 14, 1991, Magistrate Judge Weisberg granted the motion to compel, holding that Reinsurers' failure to list the attorney-client privilege in their initial log constituted a waiver of that privilege as to any document withheld on the basis of work product. (App. Pet. 1(a)[4] - transcript of proceedings dated February 14, 1991.) On March 1, 1991, Reinsurers filed a motion to reconsider. In a written order dated December 27,

[3](...continued)
documents, the 179 documents had already been produced with the redaction of handwritten notations only, and it was unclear from the very nature of the "undated" documents whether they ran afoul of the May 5, 1988 work product date. However, by the time the Court decided IIC's motion, Reinsurers had determined that there were in fact 46 documents in issue.

[4]Reinsurers will refer to the exhibits in the Appendix as "App. Pet. ____."

1991, Magistrate Judge Weisberg denied the motion but did amplify his ruling by stating that waiver of the attorney-client privilege "is appropriate as a sanction." (App. Pet. 28(a).)

Although Reinsurers suggested that a brief in camera review would resolve any doubts about the bona fides of the attorney-client privilege claim, the Magistrate Judge also declined to conduct any inspection of the documents.

C. Reinsurers' Objections to Magistrate Judge Weisberg's February 14, 1991 and December 27, 1991 Orders

Reinsurers filed objections to the Magistrate Judge's reports and recommendations. The district court overruled Reinsurers' objections on October 20, 1992. (App. Pet. 35(a).) The district court, like Magistrate Judge Weisberg,

refused to conduct any in camera inspection.

D. The Substance of the District Court's Order

In upholding Magistrate Judge Weisberg's order, the district court endorsed waiver as a sanction, taking the view that this was needed to compel attorneys to carry out their duties in a timely fashion and to eliminate duplicative litigation on new privilege claims. (App. Pet. 41(a).)

E. The Denial of the Petition for Writ

The Court of Appeals for the Seventh Circuit issued no opinion in denying the Petition for Writ of Mandamus. (App. Pet. 43(a).)

ARGUMENT

I. THIS COURT'S POWER OF SUPERVISION IS NECESSARY TO CORRECT RULINGS WHICH UNDERMINE THE PROTECTION OF ATTORNEY-CLIENT COMMUNICATIONS

A. The Court of Appeals Has Sanctioned The District Court's Gross Departure From The Judicial Norm Of Protecting The Confidentiality Of Attorney-Client Communication.

The ruling of the district court and the endorsement of that ruling by the court of appeals require this Court's attention to prevent the undermining of the protection afforded attorney-client communications. Petitioners challenge an unnecessarily harsh and grossly unfair sanction -- forfeiture of the protection of attorney-client communication -- for the "offense" of not using the "correct" privilege label even though no one had done anything in reliance on the label. The rulings as they stand represent the triumph of form over substance. This

Court, by its review, can correct this aberration, reaffirm the fundamental judicial policy of shielding attorney-client communications and overturn a harsh and grossly unfair sanction.

Under Supreme Court Rule 10, this Court's discretionary review of rulings pursuant to a writ of certiorari is appropriate:

> (a) When a United States court of appeals . . . has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

This is precisely what happened in this case -- the court of appeals sanctioned the district court's departure from the accepted and usual course of judicial protection of attorney-client communications. The district court strayed from the norm when it ordered Reinsurers to

disclose privileged attorney-client communications as a sanction because the communications had been withheld under another label. This draconian penalty was sanctioned by the court of appeal's refusal to remedy the district court's departure from the usual course.

This Court has repeatedly granted certiorari to address the failure of a district court to give adequate protection to privileged documents. For example, in Hickman v. Taylor, 329 U.S. 495 (1947) this Court granted certiorari to define the scope of protection to be given to attorney work-product in the discovery process. This Court stated that the importance of the problem - the extent to which a party may inquire into oral and written statements of a witness

- led it to grant certiorari. Id. at 500.

Similarly, in Upjohn Co. v. United States, 449 U.S. 383 (1981), this Court granted certiorari to address important issues relating to the scope of the attorney-client privilege in the corporate context. This Court held that communications between corporate general counsel and corporate employees are protected from discovery by the attorney-client privilege.

This Court has also granted certiorari to resolve important issues regarding the waiver of privilege. See e.g. Commodity Futures Trading Comm'n v. Weintraub, 471 U.S. 343 (1985) (certiorari granted to determine whether the trustee of a corporation in bankruptcy can waive the debtor corporation's attorney-client privilege

with respect to certain communications); United States v. Nobles, 422 U.S. 225 (1975) (granting certiorari to determine whether the work-product doctrine exempted an investigator's report from disclosure at trial); United States v. Zolin, 491 U.S. 554 (1989) (certiorari granted to determine whether a district court may review the allegedly privileged communications in camera at the request of the party seeking the documents to determine whether the crime-fraud exception applies); and United States v. Salerno, ___ U.S. ___, 112 S.Ct. 2503, 120 L.Ed.2 255 (1992) (certiorari granted to determine whether criminal defendants had waived their testimonial privilege by exposing privileged evidence).

Furthermore, certiorari is appropriate in cases where the Court of Appeals has

denied mandamus. "Rule 10 permits the Court to grant certiorari to remedy conduct that would not merit use of the extraordinary writ of mandamus." 13 Moore's Federal Practice ¶810.27. This Court has granted certiorari in such situations.

In Societe Nationale Industrielle Aerospatiale v. United States District Court for the Southern District of Iowa, 482 U.S. 522 (1987), the defendants were corporations owned by the Republic of France and engaged in the business of designing and manufacturing aircrafts. The plaintiffs filed suit against the two French corporations after becoming injured when their aircraft, manufactured by the defendant, crashed. Suit was filed in the United States District Court for the Southern District of Iowa. After

the plaintiffs served a second request for the production of documents, a set of interrogatories, and requests for admission, the French corporations filed a motion for a protective order. The Magistrate Judge denied the motion.

The French corporations sought a writ of mandamus from the Court of Appeals for the Eighth Circuit. The Court of Appeals denied the petition for mandamus. Despite the denial of mandamus, this Court granted certiorari to address the issue.

See also Mallard v. United States District Court for the Southern District of Iowa, 490 U.S. 296, 300 (1989)(after the Eighth Circuit Court of Appeals denied a petition for writ of mandamus without opinion, this Court granted certiorari to determine whether federal courts are authorized to require attor-

neys to represent indigent litigants in civil cases).

These cases demonstrate that it is appropriate for this Court to grant certiorari in situations like the present case where a court of appeals has denied a writ of mandamus.

B. An Order Which Compels Disclosure Of Privileged Attorney-Client Communications As A Sanction For Not Asserting The Correct Privilege Is A Departure From Usual Course Of Judicial Proceedings

The Magistrate Judge ordered Reinsurers to produce and disclose privileged attorney-client communications as a sanction against Reinsurers for failing to list all the possible privilege claims next to these documents in a privilege log.

However, the judicial policy of promoting open and complete attorney-client communication is fundamental to our judi-

cial system. Attorney-client privilege exists to promote and maintain that basic policy. Upjohn Co. v. United States, 449 U.S. 383 (1981). Accordingly, courts must be loathe to do anything which impedes or threatens open and complete communication between client and attorney. The ruling of the Magistrate Judge not only undermines this principle but does so in a manner calculated to create privilege log listings in which all claims, however fanciful, are listed, rendering the identification of privilege on the log meaningless.

Ordinarily, the attorney-client privilege is waived only by voluntary disclosure of the privileged communications, Cheeves v. Southern Clays, Inc., 128 F.R.D. 128 (M.D. Ga 1989), and not by

involuntary, inadvertent or accidental disclosure.

Furthermore, waiver is a harsh sanction only appropriate for the most flagrant violations. It is not appropriate where the party has made a good faith effort to maintain the privilege. Eastern Technologies v. Chem-Solv, Inc., 128 F.R.D. 74 (E.D. Pa. 1989); F.D.I.C. v. Cherry, Bekaert & Holland, 131 F.R.D. 596 (M.D. Fla. 1990); Southern Railway Company v. Lanham, 403 F.2d 119 (5th Cir. 1968).

C. The Facts Demonstrate That The Need For the Issuance Of A Writ Of Certiorari Is Clear And Indisputable

The factual background giving rise to the issue before this Court demonstrates the need for the writ of certiorari to correct judicial error.

The district court completely misapprehended the context of the case. Following the ruling establishing the May 5, 1988 work product date, the parties reviewed documents withheld to see what could no longer be withheld on the basis of work product. At that point, no one had yet challenged any individual claim of privilege made by the parties' privilege logs. Reinsurers in fact produced forty-nine documents to IIC that had been withheld on the basis of work-product because they predated May 5, 1988.

Redesignating the listed privilege on a small number of documents at that time was wholly appropriate. It evidences no plan to withhold material without regard to the existence of privilege. Reinsurers are not guilty of dilatory behavior, willful disregard of court rules or or-

ders, or even negligent or careless treatment of the protected documents. At worst, counsel for Reinsurers may be guilty of some slight disorganization, which resulted in 46 documents being labeled work product instead of work product and attorney-client communications out of a total of 1,635 documents being designated in a privilege log.

Nevertheless, the Magistrate Judge and the district court both held that the appropriate sanction for Reinsurers' labeling failure was forfeiture of the privilege and disclosure of the documents.[5]

The district court apparently thought the conduct of Reinsurers caused or would

[5]Notably neither the Magistrate Judge nor the District Court gave any consideration to any other sanction such as an award of costs.

cause duplicative motion practice. (App. Pet. 41(a).) That, however, was not even remotely the case. IIC had not tested the privilege claims on any aspect of the Reinsurers' privilege log - either on individual documents or on categories of documents. The only salient privilege issue which had been tested was the date on which litigation had first been contemplated. This issue, moreover, had been tested in connection with a subpoena to a law firm, not in connection with the Reinsurers' privilege log. IIC did not need to pursue duplicative motions to obtain pre-May 5, 1988 work product documents. It pursued the January 1991 motion solely to take advantage of the fact that certain attorney-client communications had not originally been labeled as such on the privilege log.

Accordingly, requiring Reinsurers to turn over attorney-client communications solely because they had not initially identified every conceivable privilege on the log is inappropriate and a clear departure from the accepted and usual course of judicial protection of attorney-client communications.

CONCLUSION

For all of the reasons set forth above, Petitioners/Reinsurers request that this Court grant their petition for writ of certiorari.

Respectfully Submitted,

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APPENDIX A

TRANSCRIBED FROM TAPE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY,	) No. 88 C 9838
Plaintiff,	) Judge Lindberg
v.	)
CERTAIN UNDERWRITERS, et al.,	) Chicago, Illinois
Defendants.	) Thursday, February 14, 1991

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE BERNARD WEISBERG,
MAGISTRATE/JUDGE

PRESENT:

For the Plaintiff:	Mr. Paul B. O'Flaherty Mr. Mark Karasik 861-2800
For the Defendants:	Mr. Gregory D. Hopp Ms. Cecelia Clark 861-1400

THE CLERK: 88 C 9838, IIC v. Certain Underwriters.

MR. HOPP: Good morning, your Honor, Gregory Hopp and Cecilia Clark on behalf of the defendants.

MR. O'FLAHERTY: Paul O'Flaherty and Mark Karasik for IIC. Good morning, your Honor.

THE COURT: All right. There are two rulings set for today. One ruling on the defendants' motion for a protective order of January 8, which involves plaintiff's interrogatories relating principally to the re-insurers' counterclaim, I'm going to defer ruling on that for about 30 days, and the reason is that we're just starting to work on the motion relating to the amended counterclaim and I think, if I have that digested, I'll be able to address the question of these interroga-

tories much more effectively than if I tried to do it now.

MR. HOPP: I understand, your Honor.

THE COURT: So that ruling is deferred until March 28, at 10:00 o'clock.

Now, turning to the second motion that was set for ruling today, which I will rule on today, that's plaintiff's motion to compel of January 10. Let me first ask the defendants' attorneys if they have anything that needs to be said in response to matters raised for the first time in the plaintiff's reply.

MR. HOPP: The only thing I would do, your Honor, is try to restate the numbers. If you find no --

THE COURT: I don't care that much about the numbers.

MR. HOPP: Okay. Then I do not.

THE COURT: All right. Here's my ruling. The defendants offer no justification for the right they claim to raise new objections in the amended privilege log many months after the initial privilege log was served and after the objections they first claimed were overruled. They suggest inadvertence but offer not supporting facts, and such a claim is not plausible here where more than 400 documents are involved. But again, it doesn't matter whether there are 40 or 400 for this purpose.

Normally a failure to raise an objection to a document request will waive that objection and we see no reason not to apply that rule here.

Defendants suggest that amendments to the privilege logs were contemplated but no facts were offered to support that

claim and there's no claim that there was an agreement to that effect. Adding new documents to the privilege log after they have been discovered, as IIC has done, is not in the same category, nor is further review of privilege logs for the purpose of narrowing privilege claims previously asserted. So I'm granting the plaintiff's motion to compel, and will order those documents produced -- 10 days?

MR. HOPP: Sure.

THE COURT: Anything else at this time?

MR. HOPP: No, I don't believe so, your Honor.

MR. O'FLAHERTY: Thank you, your Honor.

THE COURT: There was an interesting comment that I noticed at the end of the plaintiff's reply brief which, if I understand it correctly, is a request by the plaintiff for in camera review of all

attorney to client documents appearing on defendants' log. Are you asking for in camera review of all documents for which attorney/client privilege is claimed?

MR. O'FLAHERTY: Not at this time, your Honor. I think that's a matter that should be the subject of some discussion between the parties before it's ripe to come here.

THE COURT: I see, because that would get directly into the Special Master question which I -- we've had a little talk about that; haven't we?

MR. O'FLAHERTY: Very little, your Honor, I think we've raised it before and, if I may, my whole point about all this isis I would rather come up with a procedure that's going to resolve all of these rather than doing it on a motion basis.

THE COURT: Let me make a few comments on that point that you may want to factor into your discussions--thinking and discussions.

The most successful handling of this kind of problem, that is, a large case with a large amount of documents and many privilege claims to be considered that I've handled was, in one case a couple of years ago, and it worked very, very well but that's partly because of what I'm going to tell you about the arrangement that the parties agreed to. It was a complicated insurance case, as a matter of fact. The parties in that case -- as a matter of fact, Mr. White was in that case --

MR. WHITE: Right.

THE COURT: -- for Northbrook, right? Well, then, you know all about that.

MR. WHITE: Right.

THE COURT: In that case, as I recall, the parties worked out an agreed protocol under which -- I don't even know if he was called a Special Master, but an attorney -- as a matter of fact in that case the person who ended up being appointed was a former Magistrate of this Court, was appointed by agreement to review all privilege claims. He reviewed the documents.

It was agreed that there would be no appeal, that his ruling and determination would be final. It was done at the expense of the parties. It worked very smoothly, of course, because the Court never heard anything further about it. And also there was a procedure, as I remember, set up for the selection of the particular individual to do that. I

think they came up with a short list and I was supposed to then choose from the short list, make a blind choice. It turned out to be a blind choice because I think everybody understood I flipped a coin to make the determination, and I think there were just two people on the list who, as far as I knew, were each very, very well qualified.

All right. So you know about that, and you can factor that, because, if there are going to be requests for in camera review of a large number of documents, that may be the practical way that the parties will get it done within any reasonable time frame.

MR. O'FLAHERTY: Your Honor, the only inequity that I see at this point with respect to that is the rather small number of documents we seek protection for

and the rather large number that the defendants seek protection for.

MR. WHITE: That was taken care of also because it was charged -- people were charged pro rata on the amount of documents they claimed, which I think was a good idea as well.

THE COURT: If I knew that, I forgot it. All right. I'll see you next on that March date.

C E R T I F I C A T E

I hereby certify that the foregoing is a transcript of that portion of Cassette #1 which contains the proceedings in 88 C 9838, IIC v. Certain Underwriters, heard before Magistrate/Judge Weisberg on Thursday, February 14, 1991.

Kathryn Meisner
219 S. Dearborn, Room 1738
Chicago, Illinois 60604

March 9, 1991

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY, Plaintiff, v. CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants,	No. 88 C 9838
	Judge Lindberg
KEITH KERR, et al., Counter-plaintiffs, v. INTERNATIONAL INSURANCE COMPANY, Counter-defendant/ Third-party plaintiff, v. SOCIETE COMMERCIALE DE REASSURANCE S.A., et al., Third-party defendants.	Magistrate Judge Weisberg

Magistrate Judge's Ruling on Defendant Reinsurers' Motion to Reconsider February 14, 1991 Ruling on Plaintiff's Motion to Compel

This discovery dispute is now more than two years old, and we briefly review its history. On August 29, 1989 this court ruled that the work product doctrine did not protect certain documents created before May 5, 1988 because litigation over the SKB claim was not anticipated before that date. On November 13, 1990 the reinsurers' objections to that ruling were overruled by Judge Lindberg. In a letter dated January 2, 1991, Pl. Mo. to Compel of January 10, 1991 Exh. D, counsel for the reinsurers told IIC's counsel that certain documents were being withheld on the basis of attorney-client privilege. Only work product immunity, not the attorney-client privilege, had previously been claimed for these documents.

On January 10, 1991 IIC moved to compel production, contending that the documents were not protected by the privilege, and that the reinsurers had waived the privilege with respect to them by failing to raise it in their privilege log. We granted the motion on February 14, 1991, finding that the reinsurers had waived the claim of attorney-client privilege by not raising it in their privilege log. We noted that the reinsurers had offered no facts in support of their claim of inadvertence, and such a claim was not plausible in view of the number of documents involved.[1] We also found no evidence that the parties had agreed that privilege logs could be amended to assert

[1]There has been considerable dispute as to how many documents are involved, but the reinsurers acknowledge sixty-two documents. Def. Reply at 7.

new claims of privilege for the same documents.

The reinsurers filed this motion to reconsider on March 1, 1991. Consideration of this and other motions was stayed while the court considered the question of diversity jurisdiction. After reviewing the briefs, we deny the motion to reconsider. Because the original ruling was oral, we will present here in writing the reasons supporting it at greater length than would be warranted by the motion to reconsider taken by itself.

The purpose of privilege logs is to inform opposing counsel of claims of privilege for documents whose production is required. Such claims are normally considered and ruled on at the time documents are to be produced in response to a Rule 34 document request. Document pro-

duction and preparation for trial are delayed if additional privilege claims are permitted to be raised after privilege logs have been delivered and the court has ruled on the disputed issues based on those logs.

One way to require the timely assertion of privilege claims is to hold that failure to raise a question of privilege in a timely manner waives the privilege. "Waiver" can have two meanings here. It can mean a decision to relinquish the right to preserve the confidentiality of the privileged communication. A waiver in this sense is described as the intentional relinquishment or abandonment of a known right. However, the law may also deem a right to have been waived whether or not a knowing choice has been made. For example, a party who fails to object

to lack of personal jurisdiction or improper venue in a timely manner has waived the objection under Rule 12(h), Fed. R. Civ. P.

There is no express provision in the Rules regarding claims of privilege as such. However, a party is required by Rule 34 to respond to a document request within 30 days (or such time as may be ordered by the court), either stating that inspection and copying will be permitted or stating any objections and reasons for them. If not satisfied with the responding party's objections, the other party may move to compel production under Rule 37(a), and the court rules on the objections and either orders or denies production. If there is no objection, it is a violation of Rule 34 to

refuse to permit inspection of any documents requested.

The Advisory Committee Comments to the 1970 Amendments of the Federal Rules note in their commentary on Rule 33 that a party who does not make a timely objection to interrogatories risks waiving the objection, and the Committee's Notes on Rule 34 state that essentially the same procedure applies to document requests. A number of district courts have held that one who fails to raise a claim of privilege in a timely manner under Rule 34 has waived it. See, e.g., Jones v. Ada S. McKinley Community Services, No. 89 C 0319, 1989 U.S. Dist. Lexis 14312 (N.D. Ill. November 28, 1989) (Kocoras, J.) (work product immunity); Krewson v. City of Quincy, 120 F.R.D. 6 (D.Mass. 1988); Carey-Canada, Inc. v.

California Union Ins. Co., 118 F.R.D. 242, (D.D.C. 1986); Perry v. Golub, 74 F.R.D. 360, 363 (N.D.Ala. 1976); see also 4A Moore's Federal Practice at ¶34.05[2]; Cf. Bud Antle, Inc. v. Grow-Tech Inc., 131 F.R.D. 179, 182-83 (N.D.Cal. 1990) (late claim of privilege with respect to document actually produced not a waiver).

The Court of Appeals have not offered any real discussion of the issue. The First Circuit in Marx v. Kelly, Hart & Hallman, P.C., 929 F.2d 8, 12 (1st Cir. 1991), stated that one who fails to make a timely objection may be held to have waived the privilege. In Peat, Marwick, Mitchell & Co. v. West, 748 F.2d 540 (10th Cir. 1984), the court denied a petition for mandamus to compel the district court to vacate an order compelling production. The district court had stat-

ed both that the bare assertion of work product was not enough and that the plaintiff had waived its claim by not raising it in time. The Court of Appeals stated that "[t]he applicability of the privilege turns on the adequacy and timeliness of the showing as well as on the nature of the document," Id. at 542, and declined to issue the writ. In Southern Ry. Co. v. Lanham, 403 F.2d 119, 133-34 (5th Cir. 1968), the district court had rejected the contention that failure to make a timely objection waived the privilege. The Fifth Circuit noted that the privileged materials had not been voluntarily disclosed and found no other circumstances supporting a finding of waiver; it did not address whether waiver was appropriate as a sanction.

In Eastern Technologies, Inc. v. Chem-Solv, Inc., 128 F.R.D. 74 (E.D. Pa. 1989), the court discussed the court's discretion in cases of untimely assertions of attorney-client privilege. Discussing generally the failure to raise timely objections to discovery requests, the court stated that, while failure to object in a timely fashion can result in a waiver, the court has discretion not to order discovery that is patently improper, and that courts generally reserve the harshest sanctions only for the most flagrant violations. Refusing to find the privilege waived, the court stated:

> It is not that we think that the discovery requested is "patently improper"; rather, we think that, given the specific circumstances of this individual case, the failure to object is not such a "flagrant violation" as to warrant "the harshest sanctions." Also, the objection belatedly raised

> does not relate merely to relevance or to burdensomeness.

Id. at 75.

The decisions cited above that held privilege objections waived did not find waiver in the sense of an intentional relinquishment of a known right, but imposed it in order to enforce obedience to rules of procedure and court deadlines. This case is unusual in that the reinsurers did not neglect to serve IIC with their objections in the form of the privilege log; they omitted their claim of attorney-client privilege while asserting work-product immunity.

In its brief in support of the January 10, 1991 Motion to Compel, IIC treated this as a question of inadvertent disclosure, as if the reinsurers had inadvertently submitted privileged docu-

ments to IIC. IIC cited Bud Antle, 131 F.R.D. at 183, in which the court held that, although plaintiffs' late claim of privilege with respect to documents already delivered did not waive the attorney-client privilege, their lack of reasonable care in delivering the privileged documents did.

The reinsurers responded that here no disclosure has occurred, but we find the analogy persuasive nonetheless. Like an attorney reviewing documents to be supplied to an opponent, an attorney preparing a privilege log is expected to review documents and determine whether they may be privileged. If avoidance of waiver depends on an attorney's reasonable care in one instance, it should in the other. The reinsurers did not attempt to show reasonable care here.

The reinsurers argue that a waiver should not occur through inadvertence. They cite Mendenhall v. Barber-Greene Co., 531 F.Supp. 951, 954-55 (N.D.Ill. 1982) (Shadur, J.), which held that an attorney's negligent failure to discover privileged letters contained in a file turned over to opposing counsel did not waive the privilege. Viewing waiver as the "intentional relinquishment or abandonment of a known right," the court refused to find a waiver as a result of the attorney's negligence.

While we share Judge Shadur's reluctance to find waiver when it results in "harsh results out of all proportion to the mistake of inadvertent disclosure," Mendenhall, 531 F.Supp. at 955 n.8, this was a mistake, if it was a mistake, of greater magnitude and proportionately

harder to excuse than that in Mendenhall. The attorney reviewing the file in Mendenhall merely overlooked the privileged letters. Here, the reinsurers' counsel (or someone acting on their behalf) examined every document in question for the purpose of determining attorney-client privilege and work product immunity. We know this was done since work product immunity was claimed for these documents while both work product immunity and attorney-client privilege were claimed for most of the other documents listed in the privilege log. Nevertheless, the attorney reviewing these documents reviewed at least sixty-two documents as to which attorney-client privilege could be claimed and failed to claim it. Further, when the question of work-product immunity was being litigated and the court was

being asked to determine at what point litigation was actively contemplated, reinsurer's counsel apparently did not return to these documents to see whether the attorney-client privilege might be claimed.

But we need not conclude, following Bud Antle, that reasonable care is required. The reinsurers offered no explanation of how this was permitted to occur -- and with respect to so many documents. The burden was properly on them to show why their noncompliance with the rule should be excused. Not only did the reinsurers fail to show reasonable care, they failed to show that their omission of an attorney-client privilege claim was the result of inadvertence rather than an error of judgment on the part of the person reviewing the documents.

If it was an error of judgment, it binds the reinsurers. The reinsurers contend, correctly, that only the client, not the attorney, can waive the privilege. Def. Br. at 3. But while courts would prefer to avoid visiting upon clients the sins of their attorneys, our system requires that clients be bound by their attorneys' acts. Tolliver v. Northrop Corp., 786 F.2d 316, 319 (7th Cir. 1986). An attorney has an implied authority to waive the privilege on behalf of his client. In re Von Bulow, 828 F.2d 94, 101 (2d Cir. 1981) (citing Drimmer v. Appleton, 628 F. Supp. 1249, 1251 (S.D.N.Y. 1986)). Deciding whether to claim privilege is well within the scope of an attorney's agency. Attorneys customarily prepare privilege logs, and lawsuits would be considerably more burdensome

than they already are if things such as privilege logs had to be ratified by properly authorized corporate officers. Absent a showing that the attorney was acting outside the scope of his or her authority, we believe an attorney has authority to waive the privilege with respect to documents to be produced in discovery.

We thus find taking waiver as a voluntary act, that the privilege was waived as a consequence of counsel's unexplained omission. We further believe that waiver is appropriate as a sanction. The functioning of the federal courts depends on attorneys' carrying out their duties with some modicum of care and timeliness. More than two years ago IIC was entitled to inspect any unprivileged documents, and to challenge any claim of privilege.

The reinsurers claim that no one will be prejudiced if they are permitted to assert their privilege claims belatedly. We point out that the prospect of substantial additional delay to permit litigating new privilege claims is significant prejudice.

Finally, we add that this motion for reconsideration should not have been brought. The reinsurers stated that "there is no rule governing motions for reconsideration." Reply at 6 n.3, citing National Union Fire Insurance Co. v. Continental Illinois Corp., 116 F.R.D. 252 (N.D.Ill. 1987) (Shadur, J.). They misread that opinion. Judge Shadur stated, correctly, that there is no provision in the Federal Rules governing motions to reconsider. Id. at 253. However, the Seventh Circuit has ruled that motions to

reconsider serve a limited purpose: to correct manifest errors of law or fact or to present newly discovered evidence. They are not vehicles for arguments already made or that could have been made on the first presentation of the motion. Granite State Insurance Co. v. Degerlia, 925 F.2d 189, 192 n.7 (7th Cir. 1991); Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251-52 (7th Cir. 1987).

While reconsideration may on occasion produce a better result, the court does not have time to reconsider every ruling counsel thinks is wrongly decided, nor should an opponent be required to respond to an argument more than once. The reinsurers had no case law holding that a finding of waiver under these circumstances would be an abuse of discretion or otherwise improper. They had, essen-

tially, a plea for mercy based on a claim of inadvertence with no real explanation. When the court found that insufficient, that should have ended the matter.

The motion for reconsideration is denied.

ENTER:

Bernard Weisberg

United States
Magistrate Judge

DATE: December 27, 1991
cc: All Attorneys of Record
(See Attached Service List)

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS

Name of Assigned Judge or Magistrate Judge
Judge Lindberg

Case Number
88 C 9838

Date
December 27, 1991

Case Title
IIC v. Certain Underwriters

DOCKET ENTRY:

* * * * *

(10) X [Other docket entry]
Enter Magistrate Judge's Ruling on Defendant Reinsurers' Motion to Reconsider February 14, 1991 Ruling on Plaintiff's Motion to Compel. The motion for reconsideration is denied.

* * * * *

(11) X [For further detail see order attached to the original minute order form.]

* * * * *

X Notices mailed by judge's staff.

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X Copy to judge/magistrate Judge Lindberg

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RO courtroom deputy's initials

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5 number of notices

12/27/91 date mailed notice

RO mailing dpty. initials

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APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

INTERNATIONAL INSURANCE COMPANY, Plaintiff,	
v.	No. 88 C 9838
CERTAIN UNDERWRITERS AT LLOYD'S LONDON, et al., Defendants,	Judge Lindberg
KEITH KERR, et al., Counter-plaintiffs,	
v.	
INTERNATIONAL INSURANCE COMPANY, Counter-defendant.	
v.	
INTERNATIONAL INSURANCE COMPANY, Counter-defendant/ Third-party plaintiff,	
v.	
SOCIETE COMMERCIALE DE REASSURANCE S.A., et al.,	

Third-party defendants.)

MEMORANDUM AND ORDER

Defendants, Certain Underwriters at Lloyd's London, et al., pursuant to Rule 72(a) of the Federal Rules of Civil Procedure (FRCP) and Chapter 28 of the United States Code, § 636 (b)(1)(A), object to Magistrate Judge Weisberg's February 14, 1991, and December 27, 1991, orders on the grounds that the orders are clearly erroneous and contrary to law.

The events leading up to the orders are as follows. On August 29, 1989, Magistrate Judge Weisberg ruled that the work product doctrine did not protect certain documents created before May 5, 1988, because litigation over the SmithKline Beckman Corporation (SKB) claim was not anticipated prior to that date. On November 13, 1990, the defendants' objec-

tions to that ruling were overruled by this court. Counsel for defendants then informed plaintiff's (International Insurance Company) counsel, on January 2, 1991, that certain documents were being withheld on the basis of attorney-client privilege. Previously, only work product immunity, not the attorney-client privilege, had been claimed for these documents. Consequently, plaintiff moved, on January 10, 1991, to compel production of these documents, contending that they were not protected by the privilege and that defendants had waived the privilege with respect to the documents by failing to raise it in their privilege log. On February 14, 1991, Magistrate Judge Weisberg granted plaintiff's motion holding that defendants had waived the claim of attorney-client privilege by not raising

it in their privilege log. Defendants then filed a motion to reconsider on March 1, 1991. Magistrate Judge Weisberg denied this motion on December 27, 1991.

Defendants object to Magistrate Judge Weisberg's February 14, 1991, and December 27, 1991, orders and now assert that the attorney-client privilege should not be waived because: 1) their failure to list the attorney-client privilege on their log was an inadvertent mistake, 2) the parties agreed to produce new privilege logs, and 3) the attorney-client privilege may not be waived by the attorney.

Magistrate Judge Weisberg's ruling was neither clearly erroneous nor contrary to law. FRCP 72(a); 28 USCA § 636(b)(1)(A) (Supp 1992). First, defendants have failed to show any evidence that their

omission of an attorney-client privilege claim was the result of inadvertence rather than an error of judgment on the part of the person reviewing the documents. In addition to authority cited by Magistrate Judge Weisberg, In re Consol. Litig. Concerning Int'l Harvester's Disp. of Wisc. Steel, 666 F Supp 1148 (N D Ill 1987), is also pertinent to the issue of inadvertence. In that case, this court stated that a party's conduct could not be characterized as inadvertent, in order to preserve privilege claims, when it had screened its files for privileged matter earlier in the litigation. Id at 1154. Similarly here, defendants' counsel (or someone else acting on defendants' behalf) examined every document in question for the purpose of determining attorney-client privilege and work product immuni-

ty. After reviewing these documents, they chose to claim work product immunity rather than attorney-client privilege. This court does not find defendants' omission of an attorney client privilege claim an inadvertent act because the defendants first reviewed the documents in question and then made the subsequent decision to label these documents as protected by work product immunity rather than by attorney-client privilege.

Second, no evidence has been presented which indicates the parties agreed that the privilege logs could be amended to assert new claims of privilege for the same documents.

Third, this court finds, as did Magistrate Judge Weisberg, that absent a showing that the attorney was acting outside the scope of his or her authority, an

attorney does have authority to waive the attorney-client privilege with respect to documents to be produced in discovery. Our system requires that clients be bound by their attorneys' acts. Tolliver v Northrop Corp., 786 F2d 316, 319 (7th Cir 1986). This is so because "[i]f the lawyer's neglect protected the client from ill consequences, [such] neglect would become all too common. It would be a free good - the neglect would protect the client, and because the client could not suffer the lawyer would not suffer either." Id.

Finally, the functioning of federal courts depends on attorney's carrying out their duties in a timely fashion. Permitting litigation of new privilege claims will cost both the parties and the taxpayers additional money.

ORDERED: The objections of defendants, Certain Underwriters at Lloyd's London, et al., to Magistrate Weisberg's February 14, 1991, order, which found that defendants had waived the claim of attorney-client privilege by failing to raise it in their privilege log, and December 27, 1991, order, which denied defendants' motion to reconsider, are overruled.

George W. Lindberg
United States District Judge

Date: OCT 20 1992

APPENDIX D

UNITED STATES COURT OF APPEALS

For the Seventh Circuit
Chicago, Illinois 60604

December 22, 1992

Before

Hon. WALTER J. CUMMINGS, Circuit Judge

Hon. RICHARD D. CUDAHY, Circuit Judge

Hon. JOEL M. FLAUM, Circuit Judge

IN THE MATTER OF: CERTAIN UNDERWRITERS OF LLOYDS' LONDON AND COMPANIES IN, INTEREST, KEITH KERR, DENNIS JENNINGS, et al., Petitioners.	] Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 92-3675	] No. 88 C 9838 George W. Lindberg, Magistrate Judge.

This matter comes before the court for its consideration of the following documents:

1. PETITION FOR WRIT OF MANDAMUS OF DEFENDANTS AND COUNTER-PLAINTIFFS CERTAIN

UNDERWRITERS AT LLOYD'S, ET AL. filed herein on 11/3/92, by counsel for the petitioners.

2. RESPONSE OF PLAINTIFF/THIRD-PARTY PLAINTIFF INTERNATIONAL INSURANCE COMPANY TO PETITION FOR WRIT OF MANDAMUS filed herein on 12/8/92, by counsel.

On consideration thereof,

IT IS HEREBY ORDERED that said Writ of Mandamus is DENIED and the Petition for Writ of Mandamus is DISMISSED with costs.